Micro Metl Corporation *and* Local Union No. 41, Sheet Metal Workers International Association, AFL-CIO. Cases 25-CA-12202 and 25-RC-7432

July 28, 1981

DECISION, ORDER, AND CERTIFICATION OF RESULTS OF ELECTION

On March 11, 1981, Administrative Law Judge Robert A. Giannasi issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a brief in support thereof, and Respondent filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, Micro Metl Corporation, Indianapolis, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

IT IS FURTHER ORDERED that the Union's objections to the election conducted in Case 25-RC-7432 on May 8, 1980, be, and they hereby are, overruled.

As the Union has not received a majority of the valid ballots cast in the election conducted in Case 25-RC-7432 on May 8, 1980, we will certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots have not been cast for Local Union No. 41, Sheet Metal Workers International Association, AFL-CIO, and that said organization is not the exclusive representative of all the employees, in the unit herein involved, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge: This case was heard by me on December 1 and 2, 1980, in Indianapolis, Indiana. The complaint, as amended, alleges that Micro Metl Corporation (herein called Respondent),[1] violated Section 8(a)(1) of the Act by various conduct and statements made to employees. It also alleges that Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Walter Butler, and by withholding "promised and periodic" wage increases in order to discourage employees from engaging in union activities. The Charging Party, Local Union No. 41, Sheet Metal Workers International Association, AFL-CIO (herein called the Union), lost a Board-conducted election in Case 25-RC-7432; which was held on May 8, 1980.[2] The Union filed objections to that election. The objections are also alleged as unfair labor practices. The Acting Regional Director issued a Report on Objections and Challenges which was, thereafter, appealed to the Board. The Board determined that the issue on objections and two other issues involving the status of voters Butler and Cunningham should be heard in connection with the complaint in Case 25-CA-12202. The Board consolidated the two cases and ordered a hearing before an administrative law judge. The complaint alleges that the Union obtained majority status by virtue of signed authorization cards and that Respondent's failure to bargain with the Union violated Section 8(a)(5) and (1) of the Act because its unfair labor practices rendered the election invalid and require a bargaining order as a remedial matter. Respondent denies the essential allegations in the complaint and urges that the election results be upheld. The parties filed briefs.[3]

Upon the entire record in this case and from my observation of the witnesses and their demeanor, I hereby make the following:

[1] The Charging Party and the General Counsel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In sec. III of his Decision, the Administrative Law Judge stated that "Butler had not signed a card on May 21 when Propes had leafed through the cards solicited by Pope on that day." The record reveals that Propes examined the authorization cards on March 21, not May 21. We hereby correct this inadvertent error.

[2] The Administrative Law Judge recommended that the Board overruled the Charging Party's objections to the election in Case 25-RC-7432. He also recommended that the Board sustain the challenge to the ballot of Walter Butler, and that the Board direct the Regional Director to open and count the challenged ballot of James Cunningham and certify the results of the election. Contrary to the Administrative Law Judge's recommendation, we will not direct the opening of Cunningham's ballot and the issuance of a revised tally of ballots. The tally of ballots issued on May 8, 1980, shows seven votes for the Union and eight votes against the Union, with two challenged ballots. Thus, since we have sustained the challenge to Butler's ballot, Cunningham's ballot cannot be determinative of the election results. Accordingly, we will issue a Certification of Results of Election.

[1] Certain errors in the transcript are hereby noted and corrected.

[2] Seven votes were cast for the Union and eight were cast against the Union. There were three challenged ballots, only two of which are to be resolved in this proceeding.

[3] I wish to commend counsel for the Charging Party and for Respondent for their excellent briefs in this case.

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, an Indiana corporation which maintains its principal office and place of business in Indianapolis, Indiana, is engaged in the manufacture, sale, and distribution of air-conditioning components and related products. During the 12 months prior to the issuance of the complaint, Respondent sold and shipped from its Indianapolis facility goods and products valued in excess of $50,000 directly to points outside Indiana and purchased and received at its Indianapolis facility goods and products valued in excess of $50,000 directly from points outside Indiana. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Union herein is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Beginning on Wednesday, March 19, 1980, the Union undertook a campaign to organize Respondent's employees. Employee Arthur Pope was the leading employee organizer. By the following Monday, March 24, the Union had obtained 14 signed authorization cards, enough to demand recognition and file an election petition. The signed cards were secured primarily through the efforts of Pope.

On March 25, two union representatives went to Respondent's plant and sought to see President Patrick Booher. He was unavailable, so they left a letter from the Union asserting that a majority of the employees had signed cards and requesting recognition. Later that day, the union representatives filed an election petition with the Board.

On April 8, 1980, in a letter to employees, Booher acknowledged the Union's demand for recognition and stated Respondent's refusal to bargain in the absence of a Board election which had been scheduled for May 8, 1980.

I turn now to the specific allegations in the complaint.

Section 5(a) of the complaint alleges that, on or about March 21, 1980, Night Superintendent Winfrey "Wimp" Propes engaged in surveillance of union activities and threatened employees with wage reduction and plant closure if they selected a union to represent them. Employee Pope testified that, on Friday, March 21, at the end of his shift, he was waiting for employee Mike Gioscio in the warehouse so that they could leave together. He took off his jacket and laid it on some boxes. He then started talking to Gioscio. Propes, who was preparing the work of the night shift, approached Pope. Pope had some union literature and some signed union authorization cards in his jacket pocket. According to Pope, Propes removed the cards and examined them "one at a time." Gioscio confirms this testimony. According to Pope, Propes then started "telling me what he thought about the union and then he said that the money we was making right now we would be making less if the union did get in, and Pat's dad, the union tried to gat in the plant one time and he said that the, that his dad just closed down the plant and he said that would probably be the same thing that would happen." Gioscio's testimony about what Propes said is a bit different. He essentially confirmed Pope's testimony about the plant closing, but he did not testify that Propes mentioned anything about making less money if the Union came in. He did testify that Propes said that "this would cause a lot of problems." Neither employee was cross-examined about this incident.[4]

Propes acknowledges that he approached Pope and saw him with union cards. He testified, however, that the cards were "laying on his coat. . . ." Propes also testified that this incident took place during working hours, that he did not read the cards, and that no one else was with Pope. According to Propes, Pope asked him if he was going to tell Plant Foreman Ron Sandlin, and Propes "told him I didn't care what he done, the best thing he could do was through [sic] them in the trash." He denied threatening closure of the plant or reduction of wages. In his affidavit, Propes stated that he read the cards, but explained "not as far as names." He said he saw the heading on the top card, and "dropped them."

I credit Pope's testimony, as corroborated by Gioscio, that Propes did remove the cards from Pope's jacket and read them and that he made the statement attributed to him about the plant closing. Neither witness was cross-examined on this point, and the testimony is confirmed somewhat by the fact that President Booher's father did in fact move or close his operations after a union dispute. Propes seemed unsure of himself in explaining the apparent inconsistency between his testimony and his affidavit concerning whether he read the cards he picked up from Pope's jacket. On the other hand, Gioscio did not corroborate Pope's testimony that Propes said something about the employees earning less if a union were in the plant. In the absence of such corroboration, I do not view Pope's contradicted testimony as sufficiently clear to justify a finding that Propes made any kind of a threat that Respondent would lower wages if the employees selected the Union. Even in Pope's account, it was unclear whether the decrease in wages mentioned by Propes would be caused by Respondent or would be implemented in retaliation for the employees' union activity.

In accordance with the above analysis, I find that Propes removed union cards from Pope's jacket pocket, read them "one at a time and commented that he believed Respondent would close the plant if the Union were selected as bargaining representative. The latter comment is clearly an unlawful threat in violation of Section 8(a)(1) of the Act. Propes' prior conduct in removing union cards from Pope's jacket pocket and reading them individually is alleged as illegal surveillance. The General Counsel does not discuss this point in his brief. The Charging Party cites *Rich's Precision Foundry,*

[4] Pope did not vote in the election and is no longer employed with Respondent, although the record does not show when or why he left Respondent's employment. Gioscio, who is still employed, served as the Union's election observer in the May 8, 1980, election.

Inc., 250 NLRB 1317, 1319 (1980), where the Board found unlawful a search of an employee's locker for a document the employer knew had something to do with a union. Respondent points out that Propes was performing his job on company property and had no intention of trying to observe union activities. Respondent cites cases which hold, in effect, that the mere observation by an employer of employees engaging in union activity on the employer's premises is not surveillance. Here, however, Propes did more than merely observe union activity. He invaded Pope's privacy by removing cards from Pope's jacket pocket and reading them. Had Propes stopped after he picked up the cards, his conduct could be viewed simply as an act of curiosity, and, in the absence of any prior indication that he was interested in Pope's union activity, the matter could be dismissed as an isolated incident with no coercive impact. By his deliberate act of reading the cards, however, Propes engaged in the same type of activity which makes surveillance unlawful. He sought to obtain information which was or could have been useful for future discrimination. He did so in front of two employees and followed his actions with a coercive remark. Accordingly, I find that Propes' conduct in removing signed, union cards from Pope's jacket pocket and reading them individually was violative of Section 8(a)(1) of the Act.

Paragraph 5(b) of the complaint alleges that President Pat Booher threatened employees by stating that Respondent would "bargain from scratch" if the employees selected the Union as bargaining representative. The only evidence in support of this allegation was that of Gioscio who testified that, in response to an invitation in Respondent's preelection letters that employees should come in and talk to supervisors if they had any questions about the election, he went to Sandlin's office. He did not specify the date or the time of the meeting. Sandlin and Gioscio talked about the merits of union representation. According to Gioscio, Booher came into the office after about 20 minutes and joined the conversation, mentioning company benefits such as paid vacations and holidays. Booher went on to state, according to Gioscio, that if the Union "was to come in there, it would do away with all of our benefits and start from zero on negotiations for a [sic] new benefits . . . ." Booher and Sandlin denied that Booher made any such statement. Gioscio was not cross-examined on this point, but Booher and Sandlin withstood cross-examination by counsel for the Charging Party on this point. Booher testified in more detail than did Gioscio about his participation in the meeting. Booher said that the letter to employees was "self-explanatory," and he answered Gioscio's questions. In view of Booher's more detailed testimony and the fact that Gioscio came into the office specifically to ask questions, I find it likely that Booher's account is the more accurate one. Moreover, such a threat is out of character for Booher, who made a speech, which is in the record, devoid of such threats, and wrote two letters to employees whose contents were not alleged to be unlawful. I credit Booher, who was corroborated by Sandlin, that he did not threaten to bargain from scratch if the Union were selected as bargaining representative.

Paragraph 5(c) alleges that, on or about May 7, 1980, Booher threatened employees with layoff if the Union was selected by employees and "directed" that employees form their own employee committee. The allegation obviously refers to a captive audience speech given by Booher on that date to all employees. A copy of the speech is in the record and there is no allegation that anything in the speech itself is unlawful. There was a question-and-answer period after the speech, but no employees testified to any threats of layoff either during the speech or in the question-and-answer period thereafter. Some specifically testified there were none. Booher credibly denied that he ever made such threats. Accordingly, I shall dismiss the allegation in paragraph 5(c) of the complaint concerning a threat to employees that there would be layoffs if the Union were selected as bargaining representative.

With respect to the second allegation of paragraph 5(c), Gioscio testified that during the speech, "later on," Booher said that "he could not understand why we were going to pay union dues and hire somebody to come in and speak for us when it was all we had to do was just form a committee and talk to him and Mr. Sandlin." The speech, which is in the record, contains no reference to a request that employees form a committee. Booher denied that he directed, instructed, or requested employees to form their own committee to bargain with Respondent. On cross-examination, he did candidly concede that he spoke about a committee at some point during the campaign. It was assumed by counsel for the General Counsel that this took place during the question-and-answer period after the speech, but I do not believe it is clear in the record when the statement or statements were made. Booher credibly testified as follows:

> Q. You said they should have formed a committee a long time ago?
>
> A. Yes, I had been accused several times of poor communication and everytime I accuse me of it I said guilty I am guilty, guilty as charged, I had been so busy that I had not had a chance to come out and tell you employees what is going on up here and I said probably you should have formed a committee a long time ago to have settled this difference.

I believe Gioscio was confused about what was said in the speech by Booher and that he did not accurately reflect what Booher said. Presumably, other employees were present during the speech when Booher allegedly made his remarks. None, however, came forward and corroborated Gioscio even though seven or eight of them testified in this hearing. I credit Booher's testimony that he did not direct, instruct, or request employees to form a committee to bargain with Respondent on May 7, 1980, either in the speech or in the question-and-answer period after the speech. Booher's own testimony indicates that his opinion that the employees should have formed a committee "a long time ago" to facilitate communication was expressed in connection with his failings as a manager. There was no order or direction that the employees should substitute a committee for the Union

as a bargaining representative. Nor has the General Counsel shown when the remark was made or that the remark was itself coercive or made in a context of coercion. Accordingly, I shall dismiss this allegation of the complaint as well.

Paragraph 5(d) of the complaint alleges that, on or about May 12, 1980, Sandlin threatened employees with loss of future wage increases if the employees selected the Union as bargaining representative. The allegation obviously refers to a date after the Board election which was held on May 8. In his brief, the General Counsel refers only to the testimony of employee Gioscio, which is reproduced here:

> Q. Did you ever have any discussions with any supervisors about raises?
>
> A. Yes, I did.
>
> Q. Who was that?
>
> A. Ron Sandlin.
>
> Q. When did those discussions occur?
>
> A. About two weeks from the time of the election, I asked Mr. Sandlin about a merit raise and he told me that he would have to look into it, he told me to get back with him in a couple of days, so I did so and that time he put me off again, he told me to get back with him and he would let me know. So the day of the election I asked him about my merit raise and he said that he had not had time to look into it to ask him the following day which would have been a Monday was Friday when the election occurred, so on Monday I asked him and he told me that the company attorney advised him not to give out any raises until this mess was resolved and I asked him what mess this was and he said the union, and I said that I thought all of that was taken care of at the election and he said they had a vote that was marked yes and no that they had to determine how that would come out and that would take about forty-five days to do that.

Gioscio's testimony is unclear to me and completely devoid of context. Sandlin testified credibly, coherently, and in detail about the conversation. Apparently, Gioscio asked about a cost-of-living raise prior to the election. Sandlin told him he had no control over the matter and that he did not know what was going to be done about a cost-of-living raise. Gioscio and another employee approached Sandlin 1 or 2 days after the election, and asked if the employees were going to get a cost-of-living raise. Sandlin replied, "No, not at this time, on advice from our lawyer." Sandlin testified that he said this because Respondent's attorney gave him the opinion that, if a raise were given at this time, "it would look like bribery for voting the union out." Sandlin also testified that the final decision on whether and when to grant a cost-of-living raise is basically made by President Booher, although he, Sandlin, decides when employees are to be granted merit raises.

First of all, I credit Sandlin's testimony over that of Gioscio's concerning the conversation which took place after the election about the granting of raises. Sandlin's testimony both on this point and as a general matter was clearer and more candid and reliable than Gioscio's. Moreover, the record shows that Gioscio was not due for a merit increase until May 15, 1980, 2 days before he was laid off. It is thus more likely that the conversation dealt with cost-of-living increases as Sandlin testified rather than with a merit increase as Gioscio testified. The record also shows that on May 31, 1980, just 2 or 3 weeks after Sandlin's remarks to Gioscio and the other employee, the employees were granted a cost-of-living raise. Some employees were on layoff status at this time, but, when they were recalled, they were also granted the cost-of-living raise. In the past, Respondent had granted employees across-the-board cost-of-living raises on January 28, 1977, November 11, 1977, May 5, 1978, and on May 12, 1979. I find no established practice or pattern in the dates when these increases were granted.

I do not believe that Sandlin's response to Gioscio's question concerning a cost-of-living raise amounted to a threat that such raises would be withheld if the employees selected the Union as alleged in paragraph 5(d). First of all, the election had already taken place, and, although there may have been objections filed to the results of the election, nothing that Sandlin said made the raises conditional on either how the employees voted or how the election would turn out. Moreover, it is clear that Sandlin had nothing to do with the granting of cost-of-living raises, and his remarks effectively said so, leaving the matter up to Respondent's lawyer. Any apprehension the employees may have felt, that the raises might be conditioned on the eventual conclusion of the election proceedings, was removed when, 2 or 3 weeks later, employees were given a cost-of-living raise. Sandlin's remarks, thus, could not have had any significant coercive impact and certainly none at all after May 31, 1980. Accordingly, I shall dismiss the allegation in paragraph 5(d) of the complaint.

Paragraph 5(e) of the complaint alleges that, on or about March 28, 1980, Propes threatened employees with discharge if they continued to support the Union. The General Counsel makes no mention of this allegation in his brief, even though, as the Charging Party and Respondent candidly state in their briefs, there is no evidence in support of the allegation in the complaint. A conscientious government counsel has a responsibility to withdraw allegations, which are unsupported by the record, or at least to advise the trier of fact that there is no evidence to support the allegation. The allegation in paragraph 5(e) of the complaint is, of course, dismissed.

Paragraph 5(f) alleges that, on or about March 25, 1980, Propes interrogated employees concerning their union activities and threatened employees with loss of holiday and vacation benefits and other benefits if they supported the Union. The General Counsel apparently relies on the testimony of employee Walter Butler to support this allegation. Butler testified as follows:

> Two days after I signed the union card, coming back from supper, my foreman Wimp stopped at my cutting table and was talking to me about it, he asked me if I knew anything about it and I said yes, he asked me if I had signed the union card and I told him yes, and he acted like it had got him a

> little bit mad and he told me that by getting a union in we would oh, we would lose our holiday our vacation pay and he said that because I signed this card that it did not look too good for me that things could go bad for me.

Butler signed his authorization card on March 24, 1980.

Propes testified that he had no knowledge that Butler was involved in the union campaign and never asked Butler if he had signed a union card. He denied that he told Butler that "things could go bad for him," or that he could lose holiday or vacation pay.

I do not credit Butler. He was quite clear that the conversation with Propes took place 2 days after he signed his card, which would place the conversation on March 26, 1980, a date on which his attendance record shows he was absent. Moreover, it is highly unlikely that Propes approached Butler as he testified. Butler's testimony is unclear as to how the discussion began. There is no other evidence that Propes knew that Butler had signed a union card. Butler had not signed a card on March 21 when Propes had leafed through the cards solicited by Pope on that day. There was thus no reason why Propes would approach Butler and question him about the Union. Nor was there any reason for him to say that "things would go bad" for Butler since, by all accounts, Propes considered Butler a good employee and recommended to Sandlin that he be retained and given another chance when Sandlin reviewed Butler's record at the end of his probationary period. In these circumstances, I do not credit Butler's testimony that Propes questioned and threatened him as alleged in paragraph 5(f) of the complaint.

Paragraph 5(g) of the complaint alleges that Propes threatened employees in late April or early May 1980 with loss of holiday and vacation benefits if they supported the Union. The General Counsel apparently relies on the testimony of employee Mike Grever to support this allegation. Grever testified that, about a week or two before the election, he was sitting in the break area with Propes and employees John Williams, Johnny Ferguson and, he believes, Walter Butler during the second-shift lunchbreak talking about the Union. His testimony on this point is devoid of context. He simply testified that "Winfrey Propes said that the company could take away our holiday benefits." No other participant in this alleged conversation corroborated Grever, with the possible exception of Williams. Williams testified that a similar conversation took place on or about March 21, or wherein Propes "was telling us about if the Union got in that if Pat wanted to he could cut off the holiday benefits and close the shop down if he wanted to." Williams not only testified to a different date but also added a new threat which was missing in Grever's account, thus casting a serious doubt on the testimony of both employees. I viewed Williams as an unreliable witness. He seemed to exaggerate in describing the Propes conversation and, on cross-examination, admitted to not telling the truth in a statement given to Respondent's attorney. Grever's testimony was, as I have indicated, too sparse upon which to make a finding. Butler, who testified, was not asked about this conversation. Propes denied making any such threat. I shall therefore dismiss the allegation in paragraph 5(g) of the complaint.

Paragraph 5(h) of the complaint alleges that on March 21, 1980, Propes interrogated employees about their union activities. The General Counsel apparently relies, for support of this allegation, on the testimony of Williams that he had a discussion with Propes and another employee about the Union. According to Williams, Propes initiated the discussion by asking him if he signed or received a card "from Art." Williams testified about further remarks by Propes which allegedly threatened layoffs "if the union got in." The General Counsel did not allege this threat as a violation. The other employee did not testify. I do not credit Williams. I believe he embellished his testimony and was generally an unreliable witness. He made a prior statement to Respondent's counsel that he was never threatened or questioned by Propes. He admitted that he did not tell the truth in that statement, which was signed by him, even though it is not shown to have been given under oath. Williams tried to explain the earlier statement to Respondent's counsel by stating that he feared for his job when it was made. However, the record also shows that he signed a statement making it clear that participation in the interview with counsel was voluntary and that there would be no retaliation against him for answering the questions. Although I am aware of the possible inhibitions against full disclosure on the part of employees when talking to an employer's counsel about unfair labor practice charges, I am convinced that Williams' inconsistent prior statement—at a time when he had no idea he would be a witness for the General Counsel—reflects on the general reliability of his testimony. In any event, I found Williams to be an unreliable witness even without considering the prior inconsistent statement. For example, he embellished the alleged Propes interrogation with threats so similar to others alleged in this case that had counsel for the General Counsel been informed of them, he undoubtedly would have included them in the amendment which encompassed the alleged interrogation. Finally, Williams' testimony was not sufficiently detailed to warrant a finding of coercive interrogation. In these circumstances, I shall dismiss the allegation in paragraph 5(h) of the complaint.

Paragraph 6 of the complaint alleges that Respondent discharged employee Walter Butler because of his union activities. In view of my finding set forth above rejecting Butler's testimony concerning a conversation he allegedly had with Propes on March 26, 1980, there is absolutely no evidence of union animus directed toward Butler for his union activities. Indeed, he engaged in no union activities except for signing a union card. So did 13 other employees. Butler was not a leader in the campaign, and neither Propes nor Sandlin knew he signed a card or was involved in the campaign. There is thus no reason for Respondent to have singled Butler out for discriminatory treatment. Accordingly, I find that the General Counsel has not even established a *prima facie* case of a violation of the Act in Respondent's discharge of Butler.

In any event, I find that Respondent would have fired Butler even in the absence of his union activity. In con-

nection with this finding, I discuss below Butler's employment history and the circumstances of his discharge.

Walter Butler began his employment on February 25, 1980. He was discharged by Plant Foreman Ronald Sandlin on April 11, 1980, for excessive absenteeism. Respondent considers new people as probationary employees for the first 30 days of their employment. Butler's probationary period ended on March 25, 1980. Respondent has a written rule that an employee who is absent 10 days "without 8 excused absences" will be laid off for 1 week and will be terminated if he is absent 13 days "without 10 excused absences." Respondent also has a rule, which is unwritten, covering absences with respect to probationary employees. That rule provides that if a new employee is absent twice within his 30-day probationary period, he will be discharged. Sandlin credibly testified that he informed Butler of this rule when he was hired. Other employees testified that they were told of this rule when they were hired.

Butler was absent twice in the first 30 days of his employment. Sandlin considered them excused absences because Butler produced a doctor's excuse for his absences. Sandlin was unable to talk to Butler at the end of his probationary period which fell on a Tuesday. Butler was absent again on Thursday, March 26, and the following Monday, Tuesday, Wednesday, and Thursday, March 31, April 1, 2, and 3. Three of these absences were excused. As a result of these absences, Sandlin decided against giving Butler what would have been an automatic raise at the end of a probationary period and decided to extend his probationary period another 30 days. He spoke with Butler. Sandlin had checked his timecards over the past weekend, as he normally does, and he told Butler that under normal conditions he would fire Butler for his absenteeism. However, he told Butler that he had checked with Propes, Butler's supervisor, who said that Butler was a good worker with good potential. As a result, Sandlin told Butler he would retain him for another 30 days. He told Butler that, if he did not miss another day, he would get his raise, but if he did, whether it was excused or unexcused, he would be terminated. Sandlin was not sure whether this conversation was on April 4 or 7.[5] If Sandlin's weekend review was on Saturday, March 29, he would not have had any opportunity to talk to Butler until Friday, April 4, the first day Butler came to work after the end of his probationary period. He also testified that he may have forgotten to talk to Butler on Friday and talked to him instead on Monday, April 7.

Butler was absent again on Wednesday, April 9, and Sandlin discharged him on April 11 when he came in to pick up his check. At that time, Butler brought in a doctor's excuse for his absences on April 9 and 10. Apparently, Butler did report to work on April 9, but left after a short period because he was sick. He told Propes he was sick and was going home. Propes denied that he gave Butler permission to go home. Propes took no part in the discharge. Sandlin has fired several other probationary employees for excessive absences.

It is clear from the above recitation of the evidence that Respondent fired Butler for his excessive absenteeism. There is no evidence that the discharge was based on his minimal union activities. Accordingly, I will dismiss the allegation in paragraph 6 of the complaint relating to the discharge of Walter Butler.

Paragraph 6 of the complaint also alleges that, since an unknown date in May 1980, Respondent withheld "promised and periodic merit and wage increases from its employees" in order to discourage union activities in violation of Section 8(a)(3) and (1) of the Act.

The General Counsel apparently alleges that Respondent denied both merit and cost-of-living raises to employees because of the union activities, although the complaint is certainly not clear on the latter point. The General Counsel has not proved a violation by a preponderance of the evidence.

As I have discussed previously, Respondent grants two types of raises—cost-of-living raises which are essentially determined by President Booher and merit raises which are determined by Sandlin. There is no evidence that the cost-of-living raises were promised in 1980. The history of the raises in the past does not establish a pattern, but, if it did, the May 1980 raises were not outside the pattern. In the past 2 years, raises had been granted on May 5 and 12. In 1980, the raises were granted on May 31. Although the election took place on May 8, there is absolutely no evidence that cost-of-living raises were deferred until after the election for the purpose of influencing that election. The Charging Party asserts some kind of skulduggery in the delay of raises until late May because a number of union card signers, including Gioscio, Grever, and Gregory Hall, were laid-off on May 17, 1980, and presumably did not share in the bounty of the May 31 raises. This argument fails completely because there is no allegation or evidence that the May 17 layoffs were discriminatorily motivated. Moreover, there is evidence that Gioscio and Grever were recalled, and, when they were recalled, they received cost-of-living raises. Indeed, three other laid-off employees were recalled and received their cost-of-living raises at that time. In these circumstances, it is clear that the General Counsel has not met his burden of proving that the cost-of-living raises granted on May 31, 1980, were withheld in order to discourage union activities or otherwise influence the employees' protected concerted activities.

As to the merit increases, Sandlin credibly testified as follows about the criteria he uses in determining if an employee should be given a merit raise. He looks to an employee's attendance and tardiness record, takes into consideration when the employee last received a raise, and considers the quality of an employee's work. He also explained that, although he may consider an employee for a merit raise every 90 days, he has no tickler system which notifies him of when an employee is due to be considered for a raise. He simply waits for an employee to ask him for a raise. Finally, merit raises are utilized to reward good workers; they are not guaranteed.

[5] Butler testified that the conversation took place at some earlier time and that Sandlin did not specify that an unexcused absence could not be tolerated. I accept Sandlin's account of the conditions he established for Butler's continued employment.

Only three employees testified to having asked for a merit raise and not having received one. These were Gioscio, Hall, and Grever. Gioscio testified that he asked Sandlin for a merit raise about 2 weeks before the election and was allegedly put off and did not receive the raise. Sandlin testified that Gioscio did not receive a merit raise because he was not due to be considered for a merit raise at that time. Sandlin's testimony is confirmed by documentary evidence, which establishes that Gioscio was not due for a raise until May 15, 1980, 2 days before he was laid off. Hall testified that merit raises were not promised but that he believed he was due a raise on May 7, which he did not receive. Sandlin testified that Hall did not receive a raise in May 1980 because his 90-day period was not completed. Documentary evidence confirms that Hall was not due for a raise until May 14, 1980, 3 days before his layoff, not on May 7 as he testified. Grever testified that he asked Sandlin if he could get a raise and Sandlin told him he would have to wait until after the election. Documentary evidence shows that Grever was due for consideration for a merit raise on May 1, 1980. Grever was laid off on May 17, 1980. Sandlin testified that Grever did not receive a merit raise in May 1980 because he did not deserve one at that time. There is no evidence to rebut Sandlin's discretionary assessment of Grever's work. Actually, Grever received a merit raise in October 1980, about a month after he was recalled from layoff. In addition, documentary evidence shows that, during the period between the filing of the election petition and the election itself, four employees received merit raises. Three of the four had signed union cards.

In these circumstances, it is clear that Respondent did not withhold merit increases from employees in order to discourage union activities or otherwise influence the election process. I shall, accordingly, dismiss the allegations in paragraph 6 of the complaint relating to the withholding of raises.

IV. THE ELECTION ISSUES

A. *The Challenged Ballots*

The ballot of Butler was challenged by Respondent on the ground that he was no longer an employee at the time of the election. In view of my finding that Butler was not unlawfully discharged in April 1980, I shall sustain the challenge to Butler's ballot.

The ballot of James Cunningham was challenged by the Charging Party on the ground that he was a supervisor within the meaning of Section 2(11) of the Act. I find that Cunningham was not a supervisor. He was an employee entitled to vote in the election, and, therefore, the challenge to his ballot will be overruled.

Cunningham was a leadman in the warehouse. According to Sandlin, a leadman is "someone outstanding in his field and knows all aspects of the job, usually does what I tell him, as a supervisor he also knows all the aspects of the job but he has the right to change my decisions if he sees something else needs to be done." It is uncontroverted that Cunningham has no authority to hire, fire, discipline, promote, or suspend employees, and he has never exercised such authority. Sandlin testified that Cunningham has in the past recommended that an employee should be fired or disciplined, but, in that case, Sandlin would independently assess the situation. Sandlin has often failed to follow Cunningham's recommendations. Cunningham and the other leadmen—who voted in the election—earned $6.55 per hour, while supervisors earned $7 per hour. The evidence is uncontroverted that Cunningham performs the same job functions as the other employees in the warehouse except that he also fills out bills of lading. Gioscio testified that Cunningham had assigned him work to do outside of the warehouse. Cunningham testified that he only did this when he was told to do so by one of his supervisors. It is clear that Cunningham does not direct employees or exercise supervisory functions in the name of management, or by utilizing independent judgment. Accordingly, Cunningham is an employee and entitled to vote in the election.

B. *The Objections*

The question is presented, by both the Charging Party's objections to the May 8 election and the General Counsel's request for a bargaining order, of whether Respondent's violations of the Act were sufficient to interfere with a free and fair election. I have found that Respondent violated the Act in only one instance during the election campaign. This was when, on March 21, 1980, Night Superintendent Propes removed signed union cards from employee Pope's jacket pocket, read them one by one, and opined that President Booher would close the plant if the Union won representation rights. This incident took place in the presence of employees Pope and Gioscio. Another employee, Albert Guy, was in the general vicinity and saw Pope talking to Propes but he did not see or hear anything else. He testified, "I was over on the other side of the shop and I seen them over there talking." There was no evidence that he saw Propes take the cards from Pope's jacket and read them, that he heard Propes' threat, or that he was told these facts.

The Propes incident cannot provide a basis for overturning the election. First of all, the incident took place on March 21—4 days before the filing of the election petition itself. It is settled law that only objectionable conduct which occurs after an election petition is filed may be considered in determining whether the election should be set aside. *The Ideal Electric and Manufacturing Company*, 134 NLRB 1275 (1961).

In any event, there is no evidence that the details of the Propes incident were known by or disseminated to any other employees besides Pope and Gioscio or that the effects of that incident on Pope and Gioscio lingered until the May 8 election. Both were leaders in the union campaign. Pope did not vote in the election. The record is silent on why he did not vote, or even whether he was employed at the time of the election. He was in the Army and no longer employed by Respondent when he testified at this hearing. Gioscio was the Union's election observer. Propes himself was not a high level supervisor. His threat of a plant closing was in the nature of an opinion as to what President Booher would do based in turn on what his father had done in what Propes viewed as

similar circumstances. Gioscio had an opportunity to confront Propes' superior, Sandlin, as well as Booher, himself, after the Propes incident when he questioned both of them about the Union in Sandlin's office. There was no mention of Propes' threat and Booher's remarks, his written letters, and his election eve speech contained no threat of a plant closure. Propes' removing and reading the cards were likewise not made known to other employees. None of the employees whose cards were read were shown to have been the subject of any unlawful activity. I am mindful that the election was close—either 9 to 7 against representation or 8 to 8, depending on Cunningham's vote. But, in the absence of evidence of dissemination of the Propes incident and in view of its limited impact, I cannot make the inference that the election outcome was influenced by that incident. Accordingly, I conclude that the election should not be set aside. The Regional Director should open and count the ballot of Cunningham and certify the election results.[6]

CONCLUSIONS OF LAW

1. By removing union authorization cards from the personal effects of an employee, by reading them individually, and by threatening a possible plant closure if the employees select a union as bargaining representative, Respondent violated Section 8(a)(1) of the Act.
2. Respondent has not otherwise violated the Act.
3. The violations mentioned above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
4. The unfair labor practices found herein are insufficient either to overturn the election held in Case 25-RC-7432 on May 8, 1980, or to justify a bargaining order.
5. James Cunningham whose ballot was challenged in the May 8 election is an employee and his ballot should be counted.

Upon the foregoing findings of fact and conclusions of law, I hereby issue the following recommended:

ORDER[7]

The Respondent, Micro Metl Corporation, Indianapolis, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Removing union authorization cards from the personal effects of employees and reading them individually.

(b) Threatening employees with possible plant closure if employees select a union as their bargaining representative.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policics of the Act:

(a) Post at its place of business in Indianapolis, Indiana, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 25, shall, after being duly signed by a representative of Respondent, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 25, in writing, within 20 days of the date of this Order, what steps Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the Regional Director for Region 25 shall open the challenged ballot of James Cunningham, count it, and certify the results of the election in Case 25-RC-7432.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides were permitted to submit evidence, the National Labor Relations Board has ordered us to post this notice.

WE WILL NOT remove union authorization cards from the personal effects of employees, and read them individually.

WE WILL NOT threaten employees with possible plant closure if they select a union as their bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

MICRO METL CORPORATION

[6] Needless to say, the unfair labor practices in this case fall far short of those serious enough to justify a bargaining order based on signed union authorization cards from a majority of employees.

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."